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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

WM. J. LEMP BREWING COMPANY,
Petitioner,
v.
EMS BREWING COMPANY,
Respondent.
No. 634.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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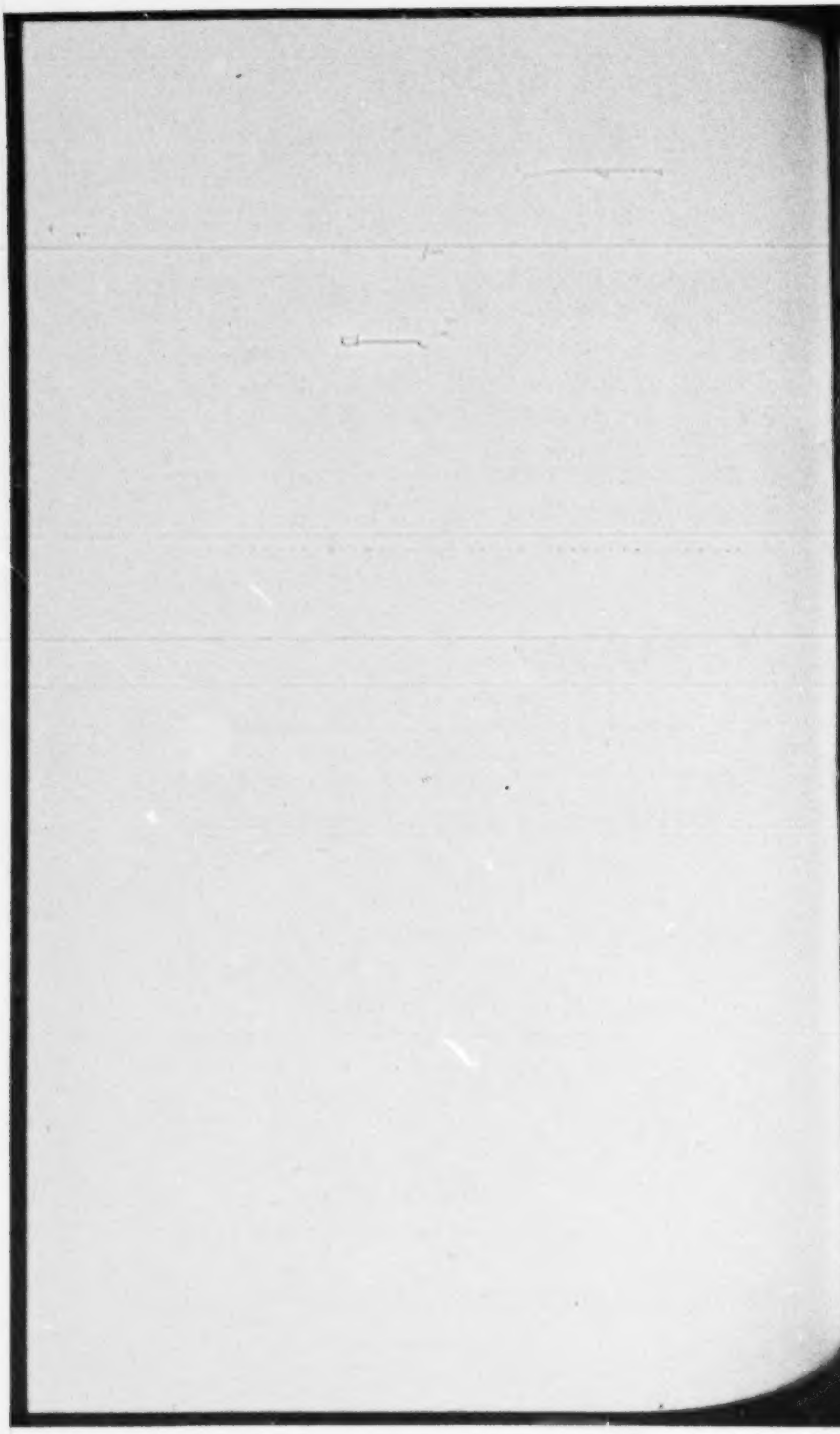

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STATEMENT OF THE CASE.

The Statement of petitioner is substantially correct. However, there are certain relevant facts not sufficiently included in petitioner's Statement, to which we desire to call the attention of the court.

This is a suit upon a written contract dated August 25, 1939 (Rec. pp. 13-19), entered into by and between petitioner, a Missouri corporation, and William J. Lemp, now deceased, on the one part, and the former Central Breweries, Inc., an Illinois corporation, now dissolved, on the

other part. By successive assignments from said Central Breweries, Inc., respondent, an Illinois corporation, became a party to said contract.

Damages are claimed by petitioner because of respondent's claimed failure to continue to carry out the terms of said contract and to continue to pay royalties to petitioner under the terms of said contract.

By the Second part of the aforesaid contract (Rec. p. 14), petitioner gave to respondent its consent to use by respondent of the name "Lemp" in its corporate name and for its use in the production, sale or distribution of beer.

The Fourth part of said contract (Rec. p. 16) provided as follows:

> "Fourth:—First Party Agrees to pay Second Party upon beer manufactured, produced, and sold by it beginning November 1, 1939, royalties as follows:
>
> "(a) Fifty cents (50¢) per barrel on all beer (draught as well as bottled) brewed and sold by First Party under a corporate name including the name 'Lemp' and retailed at fifteen cents (15¢) per bottle or at a comparable price for draught beer, and five cents (5¢) per barrel on all beer in excess of ninety thousand (90,000) barrels per annum brewed and sold by First Party and retailed at ten cents (10¢) per bottle or at a comparable price for draught beer.
>
> "(b) In the event the only beer produced and sold by First Party under a corporate name including the name 'Lemp' is retailed at ten cents (10¢) per bottle, or at a comparable price for draught beer, First Party agrees to pay to Second Party as the sole and only royalty under this contract, twenty-five cents (25¢)

per barrel on all beer (draught as well as bottled) brewed and sold by First Party in excess of ninety thousand (90,000) barrels per annum."

The Eighth part of said contract (Rec. pp. 17-18) was as follows, to-wit:

"Eighth:—Second Party hereby grants to First Party the exclusive right, option, and privilege for a period of five (5) years from and after the date of this contract, to purchase at any time within said period all of the assets of Second Party, specifically including, without in anywise limiting the generality of the foregoing, this contract and all rights and privileges hereunder and the right to use the corporate name of Second Party and the good will of Second Party, for that number of shares of the common stock of First Party which is equivalent to thirty per cent (30%) of its then outstanding common stock, said thirty per cent (30%) of common stock to be issued out of presently or then authorized but unissued common stock of First Party.

"Second Party agrees that during the period the said option to First Party hereinabove granted shall be in force and effect, it will not sell, assign, transfer, or encumber its assets, or any of them, including this contract, or its corporate name, or its good will, or its rights to the use of the name 'Lemp,' except subject to the option herein granted to First Party, provided, however, that nothing herein contained shall be construed to deprive Second Party of the right to declare and pay out of its earnings, dividends to its stockholders."

SUMMARY OF ARGUMENT.

Petitioner has alleged that the United States Circuit Court of Appeals misapplied the Conflict of Law rule of the state of Illinois and also alleged that the Circuit Court of Appeals erred in holding it was immaterial whether the Missouri or Illinois law was applied by the court as the results would be the same.

The written contract upon which petitioner filed suit in the District Court in Illinois was clear, certain, unambiguous, and speaks for itself. The meaning of the contract is so clear that neither the District Court nor the Circuit Court of Appeals could have interpreted it in any different manner without doing violence to the written words of said contract. As neither the place where said contract was made nor the place where it was to be performed was alleged in the Complaint, the United States Circuit Court of Appeals, as its opinion shows, in answer to petitioner's intimation in its Brief and Argument that the contract was executed in Missouri, correctly found that the contract sued upon was terminable at will under the laws of either Missouri or Illinois. The words, royalties were to be paid on all beer brewed and sold under a corporate name including the name "Lemp," are so clear that no court anywhere could interpret them to mean that royalties were to be paid after the name of respondent was legally changed from "Lemp Brewing Co." to "Ems Brewing Co.," regardless of the laws of the state that would be applied in interpreting said written contract.

ARGUMENT.

Petitioner has alleged two grounds upon which it urges this court to issue its writ of certiorari. The first ground alleged is, that under the Conflict of Law Rule of Illinois the law of that state in which the contract was executed was the appropriate state law governing the construction of the contract and that the District Court had no power to grant respondent's motion for judgment upon the pleadings upon a record which did not disclose the place of execution of the contract. The second ground alleged is, that the Appellate Court erred in holding it was immaterial whether construction of the contract was governed by Missouri or Illinois law and that the Appellate Court did not search for and apply the entire body of the substantive law of Missouri.

There is no occasion for this court to exercise its discretionary power to review this private litigation. Jurisdiction in the District Court was solely by reason of diversity of citizenship; no federal statute and no federal question is presented. There is here no important question of local law, no question of conflict between decisions, and no question of departure from the accepted and usual course of judicial proceedings.

This is a dispute between two parties concerning the interpretation of a certain contract (Rec. pp. 13-19) and the manner in which that contract was terminated. The respondent contended that its obligation to pay royalties to the petitioner ended when respondent ceased to brew and sell beer under a corporate name including the name "Lemp." The respondent also contended that it could terminate the contract at any time after the expiration of five years from the contract's effective date. The

contract itself and the facts concerning the manner in which it was terminated were set forth in the petitioner's Complaint (Rec. pp. 2-19), and, on the basis of the contract and these facts, the District Court ruled as a matter of law that there could be no recovery by the petitioner (Rec. pp. 33-35), entering a judgment on the pleadings in favor of respondent (defendant below). This ruling was affirmed by the U. S. Circuit Court of Appeals for the Seventh Circuit (Rec. pp. 52-56), 164 F. (2d) 290.

The situation here is quite different from those involved in the case of Erie Railroad Company v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188; Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 82 L. Ed. 1290; New York Life Insurance Co. v. Jackson, 304 U. S. 261, 82 L. Ed. 1329; Rosenthal v. New York Life Insurance Co., 304 U. S. 263, 82 L. Ed. 1330; Klaxon Company v. Stentor Elec. Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477, and Griffin v. McCoach, 313 U. S. 498, 85 L. Ed. 1481, cited by petitioner. Here there was no failure to apply the common law of a state. Nor was there any question of general federal common law.

Petitioner in its Argument (pp. 22-23 of its Brief) relies on the case of Oakes v. Chicago Fire Brick Co., 388 Ill. 474 (l. c. 479), as follows: "Where there is nothing in the contract or in the proof to show where the contract is to be performed, it is governed by law of the place where made." But in the present case petitioner in its complaint did not allege where the contract was made nor where it was to be performed. As said by the Court of Appeals, petitioner has only contended in its Argument that the contract was made in Missouri. There is nothing in the record to show it. As said by the Appellate Court of Illinois in Mutual Life Ins. Co. v. Divine, 180 Ill. App. 422 (l. c. 425), which case has

never been overruled or distinguished by the Supreme Court of Illinois or by any other Appelalte Court of Illinois:

> "If it is not known where a contract is made then the common law must be applied in such construction."

And the common law that would be enforced in Illinois by a Federal Court sitting in Illinois would be the Illinois common law.

Erie R. Co. v. Tompkins, 304 U. S. 64 (l. c. 79).

The Circuit Court of Appeals answering petitioner's contentions that the law of Missouri governs in the interpretation of this contract, citing Missouri and Illinois cases, expressly found, contrary to the petitioner's contentions, that the contract would be terminable at will under the law of either state and that no question of conflict of laws is involved (Rec. p. 56). This finding conflicts with no case cited by the petitioner.

In the absence of showing any conflict, petitioner's position is untenable. Cases like Griffin v. McCoach, 313 U. S. 498, 85 L. Ed. 1481, do not support petitioner. The references to Missouri law in the opinion of the Circuit Court of Appeals are answer enough to the argument that that court erred in failing to search for and apply the entire body of the substantive law of Missouri. Petitioner has presumably engaged in such a search, but no contract interpretation case cited does more than rule upon the particular contract involved. None of them purports to rule upon a contract identical, or even similar, to the one involved in this case and a study of all of them will not reveal any principle which was overlooked by the courts below.

The petitioner beclouds the issues by an extensive argument about the principles of conflict of laws when, in fact, no conflict exists. Petitioner would have this court consider such principles in the abstract and ignore the fact that they do not apply to the particular matter at hand.

There is nothing doubtful or obscure about the terms of this contract as to which the laws of various states which had a relationship to the controversy might differ. There are no principles to which the courts below could turn in determining the question of whether or not the contract was clear and unambiguous. The contract itself must determine this. The District Court did exactly what the Complaint required it to do: it interpreted the contract and found it clear and unambiguous. It found that, after five years from the time it went into effect, if the option provided therein was not exercised, the contract was terminable at will by either party; that the notice of termination given by the respondent of its purpose to terminate was not only reasonable in length of time but went beyond any requirement of the contract; that the economic condition of the country as affected by availability or nonavailability of materials and equipment necessary for petitioner to begin and carry on the business of manufacturing beer at the time of said notice is immaterial in view of the terms of the contract; that respondent at the time it gave notice of the termination of the contract, which was after said five-year option period, was under no obligation to continue the manufacture and sale of beer under the name of "Lemp" or under a corporate name of which the name "Lemp" was a part; was not precluded from changing its corporate name to a name of which the name "Lemp" formed no part; was not precluded from manufacturing and selling beer under any other name it might choose, and was under no obligation to pay royalties to petitioner upon any beer manufactured and sold under any

name other than "Lemp" or which did not include the name "Lemp" (Rec. p. 34).

The Circuit Court of Appeals, in reaching the same conclusion, found that the language used in the contract is certain, unambiguous, and speaks for itself (Rec. p. 55).

Petitioner ignores the fundamental principle of contract law that when a contract's language is certain and unambiguous the contract speaks for itself. Under such circumstances its interpretation is solely for the court before whom the suit is brought.

> Hines v. Ward Baking Co., 155 F. (2d) 257 (Seventh Circuit).

Likewise, where the language of a contract is clear and unambiguous, questions as to the admissibility of extraneous evidence have no relevance. As found by the Trial Court and Circuit Court of Appeals, there is no ambiguity in the contract here sued upon. The Court of Appeals in its opinion (Rec. p. 55) said:

> "The language used in the contract is certain, unambiguous, and speaks for itself. The contract does not disclose any language expressing an intention of the parties that the contract should continue in perpetuity, and nowhere in the contract is there any time fixed during which the contract is to continue in force, except as we have already noted,—that Central was granted an option for a period of five years to purchase all of plaintiff's assets, and that plaintiff agreed that during this period of five years it would not sell its assets or its rights to the use of the name 'Lemp.' "

The Missouri courts, like the courts of Illinois, adhere to the well established rule that where there is nothing am-

biguous in the language of a contract, the court's duty is to construe the contract as written.

Tant v. Gee (1941), 154 S. W. (2) 745, 348 Mo. 633;
Illinois Fuel Co. v. Mobile & O. R. Co. (1928), 8 S. W. (2) 834, 319 Mo. 899;
Whiting v. St. Louis & S. F. R. Co. (1887), 28 Mo. App. 103;
Kansas City Life Ins. Co. v. Wells (C. C. A. 8, 1943), 133 F. (2) 224;
Green v. Ashland State Bank, 346 Ill. 174 (l. c. 182);
Westinghouse Electric Elevator Co. v. LaSalle Monroe Bldg. Corp., 395 Ill. 429 (l. c. 433);
Domeyer v. O'Connell, 364 Ill. 467.

"The general rule is that the construction of contracts is for the court and not the jury."

Rode v. Gonterman, 41 F. (2d) 1;
Schneider v. Neubert, 226 Ill. App. 84, affirmed 308 Ill. 40.

In this contract there is nothing which is not clear. Royalties were to be paid to petitioner "on all beer (draught as well as bottled) brewed and sold by First Party under a corporate name including the name 'Lemp'" (Clause Fourth of the Contract, Rec. p. 16). There is no occasion whatever for the admission of extraneous evidence in view of this wording and there would be no justification for admitting any under the law of the State of Missouri. The contract clearly shows the intention of the parties that it could be terminated at will at any time after the five-year option period. There was no irrevocable consideration given by petitioner in this case, nor any independent additional consideration. All petitioner did, as shown by the allegations of the complaint, paragraph 10, Count I (Rec. pp. 10-11), was to consent to use by Central of the name "Lemp", provided such use was incidental to the

production, sale or distribution of beer, and to consent to "Lemp" becoming a part of Central's corporate name.

In the case of Paisley v. Lucas, 346 Mo. 827, 143 S. W. (2d) 262, the contract considered was held to be terminable at the will of either party, and the Missouri Supreme Court stated the prevailing view in Missouri as follows, 346 Mo., l. c. 842:

> "The applicable rule of law is well stated in the case of James Maccalum Printing Co. v. Graphite Compendius Company, 150 Mo. App. 383, 391, 392, 130 S. W. 836, 838, as follows: 'The courts are prone to hold against the theory that a contract confers a perpetuity of right or imposes a perpetuity of obligation. Yet it seems to be the law in this state that, where the intention to do this is unequivocally expressed, the contract will be upheld. (Citing cases.) But in this jurisdiction, as in others, courts will only construe a contract to impose an obligation in perpetuity when the language of the agreement compels that construction.' * * * "

Under the Fourth part of the contract sued on relating to payments of royalties (Rec. p. 16), royalties were to be paid only for beer brewed and sold under a corporate name including the name "Lemp". The respondent is an Illinois corporation, as shown by the complaint (Rec. p. 3). As such corporation, both Central and respondent had the undoubted right to change their name at any time as such right is given by the statutes of the state of Illinois (ch. 32, Par. 157.52 [a] Ill. Rev. Stat. 1945), and which said act has been in full force and effect since 1933. Petitioner signed said contract knowing, or being presumed to know, of such statutory right, but knowing the same, did not have Central Breweries waive said right by terms of said contract of August 25, 1939. Said contract bound respond-

ent to pay royalties on beer brewed and sold under a corporate name including the name "Lemp". There is not a word in said contract requiring the payment of royalties under any other corporate name. As respondent had a legal right to change its name, as petitioner knew of said right, as royalties were only to be paid on beer brewed and sold only under a corporate name including the name of "Lemp", when the name of respondent was changed from "Lemp" to "Ems" said contract required no further payment of royalties to petitioner and petitioner, therefore, suffered no damages because of respondent's failure to pay any further royalties.

Part Eighth of the contract (Rec. pp. 17-18), bound petitioner only for five years, the option period granted in said part of the contract, not to sell, assign, transfer or encumber its assets, or any of them, including this contract, or its corporate name, or its good will, or its rights to the use of the name "Lemp", except subject to the option therein granted. Said inhibitions expired after said five-year period and expired prior to the termination of the contract by respondent.

Petitioner raises the point as to whether the termination notice given by respondent was reasonable, a question which was considered by the District Court (Rec. p. 34). Petitioner states that the Circuit Court of Appeals did not discuss or refer to the question of reasonable notice (petitioner's Brief p. 37). The record shows that that court did refer to it (Rec. p. 54).

The District Court further considered petitioner's argument about War Food Administration Order No. 66 and found that the economic condition of the country as affected by availability or non-availability of materials and equipment necessary for petitioner to begin and carry on the business of manufacturing of beer at the time of the

termination notice is immaterial in view of the terms of the contract (Rec. p. 34). Petitioner's Complaint contains no allegation that petitioner ever had engaged in the brewery business prior to August 25, 1939, the date of entering into the contract between petitioner and Central Breweries and the Complaint contains no allegation that petitioner had any such intention.

Such arguments, relating to points considered by the courts below in the light of the pleadings and the contract, are not the type which this court should consider in passing upon a Petition for Writ of Certiorari, particularly where action taken by respondent has not been shown to be governed by any local decision. Some cases are cited by petitioner which purport to require reasonable notice under their particular facts. The District Court here held that the notice given by respondent was reasonable (Rec. p. 34).

Neither this contract nor any similar contract has ever been interpreted by any court of Missouri, Illinois, or any other state, as far as we can find, prior to its interpretation by the District and Appellate Courts in this case. There was, therefore, no decisive authority anywhere on its interpretation. As noted above, the United States Circuit Court of Appeals did make a search of the Missouri substantive law relating to the construction of this contract as well as the law of Illinois because "plaintiff intimates that the contract was executed in Missouri" (Rec. p. 56). The Court of Appeals found that the contract would be terminable at will under the law of either state (Rec. p. 56).

The wording of the contract sued upon is so clear and so certain that we do not believe any court anywhere could interpret said contract so as to require respondent to pay royalties to petitioner after it had changed its corporate name from "Lemp" to "Ems" Brewing Co.

and had ceased brewing "Lemp" beer and, not being liable to petitioner for royalties, petitioner suffered no damages for which respondent could be held liable.

There can be no doubt but that the petitioner, when it filed this suit, expected the contract and the facts alleged in its Complaint to speak for themselves. At that time petitioner considered the place of execution as being of so little importance that petitioner neglected even to allege it in the Complaint. At no subsequent time has petitioner sought to amend its pleading in this respect. But, now that the courts have exercised their function, interpreted the contract, and ruled that petitioner has no cause of action thereunder, the petitioner is grasping at this straw created by petitioner's own omission.

Nothing would be accomplished except delay if the District Court were required to hear testimony as to place of execution and place of performance. Once it had been heard, the District Court would be faced with the same duty which it has already fulfilled: to interpret the contract according to its terms. This court should not exercise its discretion to effect any such result.

CONCLUSION.

The record clearly shows that the courts below discharged all their duties in the premises. They concluded that, since the contract is clear and unambiguous, it should be interpreted according to its terms. They then proceeded to interpret it, as the common law of any state would require. Such procedure involves no departure from the usual course of judicial proceedings, nor does the result, which is limited to the particular contract before the court, give rise to any important question or conflict with any decided case.

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this court, and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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